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SUPREME COURT U.S.
FILED
OCT 1 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 352

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, *Appellant*,

vs.

ILLINOIS COMMERCE COMMISSION EX REL. ILLINOIS CENTRAL RAILROAD COMPANY, *Appellees*.

Appeal from the Supreme Court of the State of Illinois.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM

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STATEMENT.

Appellees' statement of the case in their motion to dismiss or affirm requires supplementing the statement of the case contained in Appellant's Jurisdictional Statement.

Tests made in 1926 by the Delaware, Lackawanna and Western Railroad Company (Lackawanna) on an automatic train stop system it had installed, made by the same manufacturer and having the same basic features as the one installed by Illinois Central Railroad Company (Illinois Central), disclosed it was so susceptive to other

sources of 60 cycle alternating current that the Lackawanna decided to change it promptly to 100 cycles (Addnl. Abst. 17).[1]

The type of automatic train stop system placed in operation in January, 1926, by Illinois Central is known and sometimes referred to as a continuous system. The Committee on Automatic Train Control of the American Railway Association in 1930, at a time when Illinois Central's Vice President was Vice Chairman of the Committee, published a bulletin entitled "Automatic Train Control, Early Developments, Tests, Types of Devices, Interstate Commerce Commission Orders, and Present Situation," which contained the following (Addnl. Abst. 2):

> "During the development of the continuous system it became evident that, to avoid interference from other sources of alternating current, a special frequency would be required. After various tests and investigations a frequency of 100 cycles was adopted as being less subject to interference from commercial sources." (Addnl. Abst. 2.)

Stray or foreign current in the rails may cause a false green signal in a locomotive carrying single channel equipment and a false red signal in a locomotive carrying two channel equipment. From 1926 to 1946 all locomotives operated in connection with Illinois Central's train stop system carried single channel equipment and the presence of foreign current being evidenced by the same green light as the proceed signal meant that the only way the operator of such a locomotive had of knowing he was receiving a false green signal was by a wreck or near-wreck (Abst. 91). In 1946 Illinois Central began equipping its locomotives

(1) Abstract and additional abstract references are to pages of the abstract or additional abstract, as the case may be, filed in the Supreme Court of Illinois, both of which have also been filed in this Court.

with two channel equipment. This equipment was much more susceptive to stray or foreign current (Abst. 97.)

Three of Illinois Central's locomotive engineers admitted that they had been instructed not to report false red signals experienced in certain areas where foreign current was known to be present and that they did not report such false signals (Addnl. Abst. 23, 24, 25). The reports of the locomotive engineers were part of the source material for Illinois Central's monthly reports to the Interstate Commerce Commission (Addnl. Abst. 7). Illinois Central's signal engineer who signed the monthly reports to the Interstate Commerce Commission admitted that, notwithstanding the direction contained in the Interstate Commerce Commission Order of August 11, 1926 (115 I.C.C. 256), to watch for the presence of stray or foreign current in the track rails, to promptly employ adequate means for overcoming the same and to keep the Commission informed with respect thereto (pertinent portions of this order are quoted at pages 10 and 11 of the Jurisdictional Statement), nevertheless, he screened the reports of the locomotive engineers, and reports of false signals where foreign current was known to be present were not included in the reports to the Interstate Commerce Commission (Abst. 107). His excuse for these omissions from the reports made to the Interstate Commerce Commission was that the system in showing a red signal was doing what it was supposed to do (Abst. 107). This explanation is more readily understandable in the light of his admission that in his opinion the Illinois Central would not have been permitted to install the train stop system if the Bureau of Safety of the Interstate Commerce Commission thought there were foreign current problems present (Abst. 66).

Appellees suggest, at page 18 of their Motion, that the Illinois Commerce Commission (Illinois Commission) exercised its authority to correct a dangerous situation created by the facilities of the Power Company. The dangerous situation was in the operation of the train stop system. It was not due to any negligence on the part of Appellant, whose lines were well constructed and maintained in general conformity with recognized requirements (Addnl. Abst. 14), but was due to the susceptiveness of Illinois Central's train stop system. The unsuitability of the train stop system had been recognized for at least twenty years but information of the numerous false signals it was giving had been withheld from the Interstate Commerce Commission.

Appellees incorrectly state that the load carried by Appellant's lines parallel to the part of Illinois Central's tracks involved in this case increased 1130 per cent from 1926 to 1953. Said rate of increase was found as to Appellant's entire system (Jurisdictional Statement, p. 59a). There was no finding in this case as to the increase in load carried by Appellant's lines parallel to Illinois Central's tracks, which lines constitute only a minor part of Appellant's transmission and distribution system.

Illinois Central, in the original installation of its train stop system which included the use of extremely delicate instruments, devoted its property to a highly special use. A long line of authorities holds that one who devotes his property to a highly special use cannot thereby control or limit the use which his neighbors may make of their property. With respect to communication and power lines, these cases hold that the responsibility for adapting a communication system so as to immunize it from the effects of foreign current rests upon the owner of such

system, not on the utility maintaining the power lines where the power lines are well maintained, are operated free from negligence and conform to modern requirements. **Eastern and South African Telegraph Company v. Cape Town Tramways Companies**, 71 L.J.P.C.N.S. 122, 50 Week. Rep. 657, 86 L.T.N.S. 457, 18 Times L.R. 523, 2 B.R.C. 114 (House of Lords 1902) and **Lake Shore & M. S. Ry. Co. v. Chicago L. S. & S. B. Ry. Co.**, 48 Ind. App. 584, 92 N.E. 989 (1910), are representative of this line of cases.

In **Georgia Power Company v. Parker**, 48 Ga. App. 807, 808, 173 S.E. 730, 731 (1934), the Court, in holding that the electric utility was not liable for the cost of immunizing the communication system, based on the failure of the communication system to conform with modern standards, said:

> "A power company, lawfully maintaining its power lines constructed according to the standards of modern engineering, on one side of a public highway, is not liable for inductive interference of a telephone line on the other side of the highway, or for the cost of metallicizing the telephone line, so as to prevent such interference, where the telephone was a single wire system, with a return circuit through the ground, which was not in accordance with the standards of modern engineering."

In the present case, the dangerous situation complained of, far from being caused by the facilities of Appellant, was caused by the fact that Illinois Central had failed to conform its system with engineering standards which had been recognized at least since 1930. The true subject matter of this case, as it stands on appeal, is the ordering by the Illinois Commission of changes in Illinois Central's

train stop system and the allocation of one-half the cost of such changes to Appellant. The action of the Illinois Commission in ordering changes in Illinois Central's train stop system represents an invalid invasion of a federally preempted field of regulation.

ARGUMENT.

I.

The Judgment of the Supreme Court of Illinois does not rest on an adequate non-Federal basis.

The judgment of the Supreme Court of Illinois is dependent upon the jurisdiction of the Illinois Commission to order the Illinois Central to change its train stop system. While it is true that the Illinois Commission has jurisdiction to require Appellant to operate and maintain its facilities in a safe and proper manner, it does not follow that such jurisdiction establishes jurisdiction in the Illinois Commission to order changes in Illinois Central's train stop system. To support the orders of the Illinois Commission it must be held that the Illinois Commission had jurisdiction to require the changes in Illinois Central's train stop system which it in fact ordered. The Supreme Court of Illinois recognized the need for jurisdiction over Illinois Central when it said:

> "The Commission had jurisdiction over both the Power Company and the Railroad as public utilities within the meaning of Section 10.3 of the Act (Ill. Rev. Stat. 1957, Chapter 111⅔a, par. 10.3). As such public utilities deriving their franchises from the State, both must submit to the burdens, conditions and regulations imposed by the State pursuant to its police power to protect the safety and security of the public." (18 Ill. 2d 506, 512; Jurisdictional Statement, p. 6a).

The Supreme Court of Illinois again recognized that this is not a case involving simply the facilities of Appellant when it said:

> "Nevertheless it was the duty of the Commission to protect the public safety regardless of the negligence or care of the **utilities** involved.

> "If this could have been accomplished at reasonable cost by a relocation of the Power Company transmission lines, we have no doubt concerning the power of the Commission to order such relocation under section 49 of the Act." (19 Ill. 2d 515, Jurisdictional Statement, p. 10a). (Emphasis supplied.)

The Supreme Court of Illinois met Appellant's contention that regulation of automatic train stop devices is exclusively vested in the Interstate Commerce Commission by holding that Congress had not preempted the field of such regulation.

Appellees purport to question Appellant's standing to challenge the validity of the orders of the Illinois Commission by a statement of the applicable rule which is not significantly different from the rule as set forth in Appellant's Jurisdictional Statement, followed by the simple statement that the Appellant's cases are not applicable. At page 11 of their Motion, Appellees state:

> "Appellant, being subject to the jurisdiction of the Illinois Commission and responsive to its orders, may not question the validity of another portion of that Commission's order where the portion affecting it will not be influenced by the validity or invalidity of the protested portion. The cases cited by Appellant regarding the constitutionality of a statute by a party not affected by the unconstitutional portions are inapplicable."

Appellees' phrasing of the rule in terms of one portion of a statute being "influenced" by another is not materially different from the phrasing of the rule in **Williams v. Standard Oil Co.**, 278 U.S. 235, 241, 73 L. ed. 287, 309, 49 S. Ct. 115 (1929):

> "The unobjectionable part of a statute cannot be held separable unless it appears that 'standing alone, legal effect can be given to it and that the legislature

intended the provision to stand, in case others included in the act and held bad should fall.' "

In the instant case, the portion of the orders of the Illinois Commission allocating one-half the cost of the changes to Appellant is not separable from the portion ordering a change in Illinois Central's train stop system. The portions of the orders being inseparable and the portion ordering the changes being invalid, the portion allocating cost must also be invalid. The law on this point is more fully discussed at pages 23 to 26 of Appellant's Jurisdictional Statement.

Appellees' argument that Appellant is benefited by the portion of the orders of the Illinois Commission directing Illinois Central to make changes in its train stop system is beside the point because Appellant is adversely affected by orders which are, as a whole, invalid. Furthermore, the alleged benefit depends on an unwarranted assumption as to what the Illinois Commission would have done had it recognized that it did not have jurisdiction to order changes in Illinois Central's train stop system. The desired protection of public safety could not have been accomplished at reasonable cost by changes in Appellant's facilities. Appellees' benefit argument rests on the assumption that the Illinois Commission would have ordered changes in Appellant's facilities at an unreasonable cost. The Illinois Commission, when it found that elimination of the dangerous situation required changes in the train stop system and not corrective action by Appellant and that Illinois Central was not reporting the false signals caused by foreign current to the Interstate Commerce Commission as it was required to do, should have immediately brought these matters to the attention of the Interstate Commerce Commission for appropriate action by that body.

It is submitted that the Illinois Supreme Court could not have confirmed the orders of the Illinois Commission without holding that the field of regulation of automatic train stop devices has not been preempted by federal legislation.

II.

THE APPEAL PRESENTS SUBSTANTIAL FEDERAL QUESTIONS.

A. Section 26 of the Interstate Commerce Act has occupied the field of regulating automatic train stop systems used on a highway of interstate commerce, so as to preclude State regulation.

The Illinois Supreme Court in this case held that Congress by the enactment of Section 26 of the Interstate Commerce Act as amended in 1937 did not preempt the field of regulation of automatic train stop systems and that the Illinois Commission in the exercise of the police power may order changes in such systems. 18 Ill. 2d 506, 517, 165 N.E. 2d 322, 328; Jurisdictional Statement, pages 119, 120. This Court has not passed upon this question and a determination of the scope and effect of Section 26 of the Interstate Commerce Act as in force since August 26, 1937, is required in this case.

Appellees state in their Motion that "the various states have an inherent power to enact reasonable legislation for the protection of the health, safety and general welfare of persons within their respective confines, provided * * * (3) that Congress has not evidenced an intent to completely preempt the area of regulation." Appellant contends that Congress has evidenced a positive intent to completely preempt the area of regulation of automatic train stop systems. This intent is evidenced not only by the broad and general powers delegated to the Interstate

Commerce Commission by the 1937 amendment to Section 26 of the Interstate Commerce Act but also by the fact that the amendment was patterned after the Boiler Inspection Act. The testimony and committee reports which led to the enactment of the amendment discloses it was the intention of Congress to confer upon the Interstate Commerce Commission every power with respect to train stop systems and other signal devices which that body then had with respect to safety devices covered by the Boiler Inspection Act. The legislative history in connection with the adoption of the 1937 amendment to Section 26 of the Interstate Commerce Act is discussed at pages 18-20 of Appellant's Jurisdictional Statement.

Prior to the time Congress was considering the 1937 amendment to said Section 26, this Court, in the case of **Napier v. Atlantic Coast Line R. Co.**, 222 U.S. 605, 71 L. ed. 432, 47 S. Ct. 207 (1926) had held that the Boiler Inspection Act was intended to occupy the field and that state regulation was precluded. By enactment of the 1937 amendment, patterned after the Boiler Inspection Act, Congress must be considered to have adopted this Court's construction of the Boiler Inspection Act in the **Napier** case. **Shapiro v. United States**, 335 U.S. 1, 16, 92 L. ed. 1787, 1798, 68 S. Ct. 1375 (1947).

Appellees argue that the orders of the Illinois Commission directing Illinois Central to change its automatic train stop system were designed to protect the health and safety of the public. An examination of Section 26 of the Interstate Commerce Act discloses it was designed for the same purpose.

Appellees argue further that the Interstate Commerce Commission did not prescribe that Illinois Central should operate its train stop system with any particular cycle

electric current and that the orders of the Illinois Commission requiring changes in Illinois Central's train stop system merely complement the regulation of the system by the Interstate Commerce Commission. This argument ignores the well established rule that where Congress has intended to occupy a field of regulation, state regulation in that field is invalid whether conflicting or complementary. In **Napier v. Atlantic Coast Line R. Co.**, 222 U.S. 605, 613, 71 L. ed. 432, 439, 47 S. Ct. 207 (1926), this Court said:

> "The argument mainly urged by the states in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that here might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?
>
> "The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the commission has power to prescribe an automatic fire box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the commission has not seen fit to exercise its

authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We held that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. **Because the standard set by the commission must prevail, requirements by the states are precluded, however commendable or however different their purpose.** * * *

"If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample." (Emphasis supplied.)

Appellees are unable and have not attempted to distinguish the **Napier** case.

Appellees cite **Southern Pac. Co. v. Arizona**, 325 U.S. 761, 89 L. ed. 1915, 65 S. Ct. 1515 (1945), in such a way as to suggest that this Court has ruled on whether or not Section 26 preempts the area of regulation which it covers. This Court has made no such ruling. **Southern Pac. Co. v. Arizona** involved the validity of a state statute regulating the length of trains, the statute being held to be invalid as a burden on interstate commerce. The brief reference to Section 26 in the opinion in that case was as follows:

"The contention, faintly urged, that the provisions of the Safety Appliance Act, 45 USCA Secs. 1 and 9, 10A FCA Title 45, Secs. 1 and 9, providing for brakes on trains, and of Sec. 25 of Part I of the Interstate Commerce Act, 49 USCA Sec. 26(b), 10A FCA Title 49, Sec. 26(b), permitting the Commission to order the installation of train-stop and control devices, operate of their own force **to exclude state regulation of train lengths**, has even less support." (Emphasis supplied.)

In Appellant's Jurisdictional Statement it was pointed out that the **Napier** case has been cited as an example of

implied conflict between the exercise by the United States of its power of legislation and a regulation of the state. **Cloverleaf Butter Co. v. Patterson,** 315 U.S. 148, 156, fn 7, 86 L. ed. 754, 762, 62 S. Ct. 491 (1942), and that as the powers and duties conferred upon the Interstate Commerce Commission by Section 26 are very similar to those conferred by the Boiler Inspection Act under consideration in the **Napier** case, the same implied conflict must exist between the federal legislation and the orders of the Illinois Commission in the instant case. The challenged orders of the Illinois Commission in this case attempt to regulate a matter which has been specifically conferred upon the Interstate Commerce Commission. In its report dated August 11, 1926 (115 I.C.C. 256, 269) the Interstate Commerce Commission required that Illinois Central should "promptly employ adequate means for overcoming" any difficulty arising from the presence of stray or foreign current. Clearly the orders of the Illinois Commission impliedly conflict with and invalidly purport to supplant federal regulation of Illinois Central's automatic train stop system.

Appellant submits that this appeal presents a substantial federal question as to the validity of attempted state regulation in a field occupied and preempted by federal legislation and administrative action taken pursuant thereto.

B. The orders of the Illinois Commission contravene the Fourteenth Amendment to the Constitution of the United States.

Appellees attempt to dismiss Appellant's contention that the order of the Illinois Commission deprives Appellant of property without due process of law in violation of the 14th Amendment to the Constitution of the United States

by the same argument which they use in asserting that the decision below rests on an adequate non federal ground. In the face of the simple fact that the intent and effect of the orders of the Illinois Commission is to accomplish a change in Illinois Central's train stop system, Appellees argue that the Illinois Commission has the power to regulate the facilities of Appellant. Again, the power of the Illinois Commission to do something which it did not in fact do is an irrelevant abstraction. Appellant, by the orders of the Illinois Commission, is directed to pay for changes in Illinois Central's facilities, although such changes do not benefit Appellant, were not required by any fault of Appellant, and were not required by any valid order of the Illinois Commission.

Appellant may not, consistent with the 14th Amendment, be required to pay for changes in Illinois Central's railroad equipment, a matter wholly unrelated to Appellant's public business of generating, transmitting, distributing and selling electric energy. Furthermore, the order that Illinois Central change its train stop system being invalid as invading a federally preempted field of regulation, the allocation of cost order of the Illinois Commission is simply a taking of the property of Appellant for the benefit of a private person, in violation of the 14th Amendment.

CONCLUSION

Appellant respectfully submits that the judgment of the Supreme Court of Illinois does not rest on an adequate non-federal basis; that the appeal presents substantial federal questions, and that Appellees' motion should be denied.

Respectfully submitted,

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